



1 The court recommends that Smith's motion should be denied, both because it was not  
2 served on Plaintiff, and because it is without merit. In light of the fact that no response was  
3 received from Plaintiff regarding the *Klinge* order or the order extending the time to respond to  
4 the motion for summary judgment, the court will also issue an order to show cause to Plaintiff as  
5 to why this action should not be dismissed for a failure to prosecute.

### 6 **I. BACKGROUND**

7 Plaintiff is a former inmate of the Nevada Department of Corrections (NDOC),  
8 proceeding pro se with this action pursuant to 42 U.S.C. § 1983. (Compl., ECF No. 5.) The  
9 events giving rise to this action took place while Plaintiff was housed at Northern Nevada  
10 Correctional Center (NNCC). (*Id.*)

11 Plaintiff alleges that on February 5, 2018, Correctional Officer Peters told Plaintiff and  
12 his cell mate, "if there were no cameras around ... he would f\*\*\* [them] in the a\*\* like the  
13 bitches [they were]." Peters refused to give Plaintiff a grievance because Plaintiff intended to  
14 report Peters under the Prison Rape Elimination Act (PREA). Plaintiff later acquired a grievance  
15 from another correctional officer. When Plaintiff and several other inmates requested grievances  
16 from Peters for a separate incident, Peters refused, and then locked the entire unit down, stating:  
17 "You can all thank [Plaintiff]." After Plaintiff filed his PREA report, several officers asked  
18 Plaintiff to drop his PREA complaint against Plaintiff. Senior Officer Smith told Plaintiff that he  
19 and Peters were "good friends" and that if Plaintiff did not drop the report, Smith could not  
20 promise that the rest of Plaintiff's stay would be pleasant.

21 The court screened the complaint and allowed Plaintiff to proceed with a retaliation claim  
22 against Peters based on the allegation that he locked down the entire unit because Plaintiff  
23 requested a grievance form to file against Peters. He was also allowed to proceed with a

1 retaliation claim against Smith based on the allegation that after he filed a grievance/PREA  
2 report against Peters, Smith threatened to make Plaintiff's prison experience worse unless he  
3 withdrew the grievance. Finally, Plaintiff was allowed to proceed with a claim for denial of  
4 access to the grievance procedure against Peters based on the allegation that Peters refused to  
5 give Plaintiff grievances to file against him. (ECF No. 4.)

6 The Attorney General's Office accepted service on behalf of Smith, and filed under seal  
7 the last known address for Peters. (ECF Nos. 16, 17.) A summons was issued for Peters  
8 (ECF No. 20), but was returned unexecuted (ECF No. 25). Peters was subsequently dismissed  
9 without prejudice for lack of service under Federal Rule of Civil Procedure 4(m). (ECF No. 26.)  
10 Therefore, this action is currently proceeding only against Smith with the retaliation claim.

11 Smith moves for summary judgment, arguing: (1) Plaintiff does not sufficiently allege  
12 personal participation by Smith because he does not include the specific date or time of the  
13 alleged threat; (2) there is no evidence that any adverse action was taken against Plaintiff by  
14 Smith; and (3) he is entitled to qualified immunity.

## 15 **II. LEGAL STANDARD**

16 The legal standard governing this motion is well settled: a party is entitled to summary  
17 judgment when "the movant shows that there is no genuine issue as to any material fact and the  
18 movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp.*  
19 *v. Cartrett*, 477 U.S. 317, 330 (1986) (citing Fed. R. Civ. P. 56(c)). An issue is "genuine" if the  
20 evidence would permit a reasonable jury to return a verdict for the nonmoving party. *Anderson v.*  
21 *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A fact is "material" if it could affect the outcome  
22 of the case. *Id.* at 248 (disputes over facts that might affect the outcome will preclude summary  
23 judgment, but factual disputes which are irrelevant or unnecessary are not considered). On the

1 other hand, where reasonable minds could differ on the material facts at issue, summary  
2 judgment is not appropriate. *Anderson*, 477 U.S. at 250.

3 “The purpose of summary judgment is to avoid unnecessary trials when there is no  
4 dispute as to the facts before the court.” *Northwest Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18  
5 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted); *see also Celotex*, 477 U.S. at 323-24 (purpose  
6 of summary judgment is “to isolate and dispose of factually unsupported claims”); *Anderson*, 477  
7 U.S. at 252 (purpose of summary judgment is to determine whether a case “is so one-sided that  
8 one party must prevail as a matter of law”). In considering a motion for summary judgment, all  
9 reasonable inferences are drawn in the light most favorable to the non-moving party. *In re*  
10 *Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citation omitted); *Kaiser Cement Corp. v. Fischbach*  
11 *& Moore Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). That being said, “if the evidence of the  
12 nonmoving party “is not significantly probative, summary judgment may be granted.” *Anderson*,  
13 477 U.S. at 249-250 (citations omitted). The court’s function is not to weigh the evidence and  
14 determine the truth or to make credibility determinations. *Celotex*, 477 U.S. at 249, 255;  
15 *Anderson*, 477 U.S. at 249.

16 In deciding a motion for summary judgment, the court applies a burden-shifting analysis.  
17 “When the party moving for summary judgment would bear the burden of proof at trial, ‘it must  
18 come forward with evidence which would entitle it to a directed verdict if the evidence went  
19 uncontroverted at trial.’ ... In such a case, the moving party has the initial burden of establishing  
20 the absence of a genuine [dispute] of fact on each issue material to its case.” *C.A.R. Transp.*  
21 *Brokerage Co. v. Darden Rest., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations  
22 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or  
23 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate

1 an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving  
2 party cannot establish an element essential to that party's case on which that party will have the  
3 burden of proof at trial. *See Celotex Corp. v. Cartrett*, 477 U.S. 317, 323-25 (1986).

4 If the moving party satisfies its initial burden, the burden shifts to the opposing party to  
5 establish that a genuine dispute exists as to a material fact. *See Matsushita Elec. Indus. Co. v.*  
6 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party need not establish a genuine  
7 dispute of material fact conclusively in its favor. It is sufficient that "the claimed factual dispute  
8 be shown to require a jury or judge to resolve the parties' differing versions of truth at trial."

9 *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987)  
10 (quotation marks and citation omitted). The nonmoving party cannot avoid summary judgment  
11 by relying solely on conclusory allegations that are unsupported by factual data. *Matsushita*, 475  
12 U.S. at 587. Instead, the opposition must go beyond the assertions and allegations of the  
13 pleadings and set forth specific facts by producing competent evidence that shows a genuine  
14 dispute of material fact for trial. *Celotex*, 477 U.S. at 324.

### 15 **III. DISCUSSION**

16 Preliminarily, the motion should be denied because it was not served on Plaintiff;  
17 however, before the court noticed that it was not served on Plaintiff the motion was reviewed and  
18 the court determined that it was without merit. To avoid defendant Smith simply renewing the  
19 motion and serving it on Plaintiff, the court also recommends the motion be denied on a  
20 substantive basis.

21 "Section 1983 provides a cause of action for prison inmates whose constitutionally  
22 protected activity has resulted in retaliatory action by prison officials." *Jones v. Williams*, 791  
23 F.3d 1023, 1035 (9th Cir. 2015); *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995). Such a

1 claim consists of five elements: "(1) An assertion that a state actor took some adverse action  
2 against an inmate (2) because of (3) that prisoner's protected conduct, and that such action  
3 (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not  
4 reasonably advance a legitimate correctional goal." *Jones*, 791 F.3d at 1035 (quoting *Rhodes v.*  
5 *Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005)).

6 "The First Amendment guarantees a prisoner a right to seek redress of grievances from  
7 prison authorities as well as a right of meaningful access to the courts." *Id.* (citing *Bradley v.*  
8 *Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995)).

9 First, Smith argues that Plaintiff failed to adequately allege sufficient personal  
10 participation because he did not identify a specific date or time of the alleged threat by Smith.

11 This argument is without merit. First of all, Smith moves for summary judgment, but  
12 essentially argues that Plaintiff fails to state a claim upon which relief may be granted. The court  
13 has already found in its screening order that Plaintiff does state a colorable retaliation claim  
14 against Smith based on the factual allegations in the complaint. It was not necessary for Plaintiff  
15 to include the precise date or time of the alleged threat.

16 Second, Smith argues that there is no genuine dispute that the action allegedly taken by  
17 Smith was not adverse to Plaintiff because Smith only allegedly told Plaintiff if he did not  
18 withdraw the PREA complaint, his stay at the prison would not be pleasant. Smith contends that  
19 Plaintiff cannot show that any action was actually taken against Plaintiff.

20 This argument ignores clear precedent that "the mere *threat* of harm can be an adverse  
21 action, regardless of whether it is carried out because the threat itself can have a chilling effect."  
22 *Brodheim v. Cry*, 584 F.3d 1262, 1270 (9th Cir. 2009) (finding a genuine issue of material fact  
23 existed as to whether adverse action was taken where prison officials warned the inmate to stop

1 complaining). Smith does not argue that he did not threaten Plaintiff, only that there is no  
2 evidence that he actually carried out the threat; however, the mere threat of adverse action is  
3 sufficient.

4 Third, the court will address Smith's qualified immunity argument. The qualified  
5 immunity analysis consists of two steps: (1) viewing the facts in the light most favorable to the  
6 plaintiff, did the defendant violate the plaintiff's rights; and (2) was the right clearly established  
7 at the time the defendant acted. *See Castro v. County of Los Angeles*, 833 F.3d 1060, 1066 (9th  
8 Cir. 2016) (en banc), *cert. denied*, 137 S.Ct. 831 (Jan. 23, 2017).

9 Smith only argues he is entitled to qualified immunity because Plaintiff has not shown  
10 chilling of his First Amendment rights. Smith does not deny that he told Plaintiff that if he did  
11 not withdraw his PREA complaint against Peters, the rest of his stay in prison would not be  
12 pleasant. "[A]n objective standard governs the chilling inquiry; a plaintiff does not have to show  
13 that 'his speech was actually inhibited or suppressed,' but rather than the adverse action at issue  
14 'would chill or silence a person of ordinary firmness from future First Amendment activities.'" *Brodheim*, 584 F.3d at 1271 (quoting *Rhodes*, 408 F.3d at 568-69)). "To hold otherwise 'would  
15 be unjust' as it would 'allow a defendant to escape liability for a First Amendment violation  
16 merely because an unusually determined plaintiff persists in his protected activity.'" *Id.* (quoting  
17 *Rhodes*, 408 F.3d at 569).

18 Taking the facts in the light most favorable to Plaintiff, threatening an inmate with an  
19 unpleasant prison experience unless he agrees to withdraw a PREA complaint could certainly  
20 chill or silence a person of ordinary firmness from filing future PREA complaints or grievances.  
21 Therefore, Smith is not entitled to qualified immunity.  
22  
23

1 For these reasons, Smith's motion for summary judgment should be denied; however, the  
2 court will issue an order to show cause to Plaintiff as to why this action should not be dismissed  
3 for Plaintiff's failure to prosecute as the court has had no contact from Plaintiff since he  
4 participated in an early mediation conference nearly a year ago in July of 2019.

5 **IV. RECOMMENDATION**


6 IT IS HEREBY RECOMMENDED that the District Judge enter an order **DENYING**  
7 Smith's Motion for Summary Judgment (ECF No. 27).

8 The parties should be aware of the following:

9 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to  
10 this Report and Recommendation within fourteen days of being served with a copy of the Report  
11 and Recommendation. These objections should be titled "Objections to Magistrate Judge's  
12 Report and Recommendation" and should be accompanied by points and authorities for  
13 consideration by the district judge.

14 2. That this Report and Recommendation is not an appealable order and that any notice of  
15 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed  
16 until entry of judgment by the district court.

17  
18 Dated: June 24, 2020

19 

20 William G. Cobb  
21 United States Magistrate Judge  
22  
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